

7

Mintz, Levin, Cohn, Ferris, Glovsky and Popeo, P.C.

701 Pennsylvania Avenue, N.W.
Washington, D.C. 20004

One Financial Center
Boston, Massachusetts 02111
Telephone: 617/542-6000
Fax: 617/542-2241

Telephone: 202/434-7300
Fax: 202/434-7400
Telex: 753689

EX PARTE OR LATE FILED

Howard J. Symons

Direct Dial Number
202/434-7305

March 24, 1997

HAND DELIVERY

Mr. William Caton
Acting Secretary
Federal Communications Commission
1919 M Street, N.W., Room 222
Washington, D.C. 20554

RECEIVED

MAR 24 1997

Federal Communications Commission
Washington, D.C.

Re: Ex Parte Presentation
CC Docket No. 96-45 - Universal Service

Dear Mr. Caton:

On behalf of The National Cable Television Association, Inc., I today provided the attached memorandum addressing the definition of information services to James Coltharp, Legal Advisor to Commissioner Quello, and Dan Gonzales, Legal Advisor to Commissioner Chong.

In accordance with section 1.1206(a)(1) of the Commission's rules, I am submitting two copies of this notice and the attached memorandum to the Office of the Secretary.

Sincerely,



Howard J. Symons

cc: James Coltharp
Dan Gonzales

F1/64451.1

No. of Copies rec'd 041
List ABCDE

Mintz, Levin, Cohn, Ferris, Glovsky and Popeo, P.C.

701 Pennsylvania Avenue, N.W.
- Washington, D.C. 20004

One Financial Center
Boston, Massachusetts 02111
Telephone: 617/542-6000
Fax: 617/542-2241

Telephone: 202/434-7300
Fax: 202/434-7400
Telex: 753689

Howard J. Symons

Direct Dial Number
202/434-7305

March 24, 1997

HAND DELIVERY

Mr. Dan Gonzales
Legal Advisor
Office of Hon. Rachelle B. Chong
Federal Communications Commission
1919 M Street, N.W., Room 844
Washington, D.C. 20554

Re: Ex Parte Presentation
CC Docket No. 96-45 - Universal Service

Dear Dan:

On behalf of The National Cable Television Association, Inc., I am enclosing the memo on definition of telecommunications services that I mentioned in my message to you today.

Sincerely,



Howard J. Symons

cc: Secretary, FCC (2)

**INTERNET ACCESS, VOICEMAIL, AND E-MAIL ARE INFORMATION SERVICES,
NOT TELECOMMUNICATIONS SERVICES**

The Telecommunications Act of 1996 ("1996 Act") establishes specific definitions for information services and telecommunications.^{1/} These definitions are based on the terms used in the Modification of Final Judgment ("MFJ") in U.S. v. Western Electric Co., Inc.^{2/} Under the MFJ, voice storage and retrieval, electronic mail, and "gateway" services for obtaining access to information providers were all considered information services rather than telecommunications because they included the capabilities for generating, acquiring, storing and retrieving information. The same is true under the 1996 Act.

The definition of information services in the 1996 Act is nearly identical to the language of the MFJ, except that the MFJ referred to "the offering of a capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making

^{1/} "Information service" means "the offering of a capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information via telecommunications, and includes electronic publishing, but does not include any use of such capability for the management, control, operation of a telecommunications system or the management of a telecommunications service." 47 U.S.C. § 153(20). By contrast, "telecommunications" means "the transmission, between or among points specified by the user, of information of the user's choosing, without change in the form or content of the information as sent and received." Id. § 153(43). "Telecommunications service" is the offering of telecommunications for a fee directly to the public; a "telecommunications carrier" is any provider of telecommunications services. Id. §§ 153(46), (44).

^{2/} 552 F. Supp. 131 (D.D.C. 1982) (subsequent history omitted). See H.R. Rep. No. 204, Part 1, 104th Cong., 1st Sess. 125 (1995) ("Information service" and 'telecommunications' are defined based on the definition [sic] used in the Modification of Final Judgment"); cf. MFJ, §§ IV(J), (O). In the House-Senate conference on the 1996 Act, the Senate receded to the House on the definition of information service. The House receded to the Senate on the definition of telecommunications, but the House and Senate bills contained similar definitions of this term. H.R. Conf. Rep. No. 458, 104th Cong., 2d Sess. 116 (1996).

available information which may be conveyed via telecommunications."^{3/} The underlined phrase does not appear in the 1996 Act, but it was not given any special meaning by the Department of Justice or the MFJ court and the legislative history of the 1996 Act offers no rationale for omitting it. One possible explanation for the omission is that Congress wanted to clarify that only services actually utilizing telecommunications were "information services."^{4/} The "may be conveyed" language could have been read to include information that was not, but could be, conveyed via telecommunications.

From a plain reading of the language, however, the absence or inclusion of the phrase has no effect on the analysis of whether Internet access, voicemail, or electronic mail is an information service. The services at issue were considered information services under the MFJ because they included the capabilities for storing and retrieving information.^{5/} The same analysis is valid under the statutory definition of information services. The fact that service providers offer their capabilities via telecommunications does not convert the services themselves into telecommunications services.

^{3/} MFJ, § IV(J).

^{4/} The Commission has suggested that the use of the phrase "via telecommunications" means that information services are broader than "enhanced services," which are limited to services offered over common carrier transmission facilities. Implementation of the Non-Accounting Safeguards of Sections 271 and 272 of the Communications Act of 1934, as amended, CC Docket No. 96-149, FCC 96-489 (rel. Dec. 24, 1996), at ¶ 103.

^{5/} See pp. 3-4, infra.

The dichotomy between telecommunications and information services embodied in the MFJ and the 1996 Act parallels the distinction between "basic" and "enhanced" services^{6/} articulated in the FCC's Computer II proceeding.^{7/} In essence, Computer II, the MFJ, and the 1996 Act all draw the distinction between the provision of a telecommunications conduit and the provision of services that add value to the conduit (that "enhance" the conduit) through the addition of content or capabilities for "generating, acquiring, storing, transforming, processing, retrieving, or making available" content via telecommunications.

Under the MFJ, "information services" included not only services in which the telephone company controlled the content but also "services which would involve no control [by the telephone company] over the content of the information other than for transmission purposes."^{8/} In this latter category were contained data processing services as well as voice

^{6/} The Commission defined basic services as "pure transmission capability over a communications path that is virtually transparent in terms of its interaction with customer supplied information." Amendment of Section 64.702 of the Commission's Rules and Regulations (Second Computer Inquiry), 77 FCC 2d 384, 420 (1980) ("Computer II Final Order") (subsequent history omitted). Enhanced services are "services, offered over common carrier transmission facilities used in interstate communications, which employ computer processing applications that act on the format, content, code, protocol or similar aspects of the subscriber's transmitted information; provide the subscriber additional, different, or restructured information; or involve subscriber interaction with stored information." 47 C.F.R. § 64.702(a).

^{7/} See U.S. v. Western Electric Co., Inc., 552 F. Supp. 131, 178 n. 198 (D.D.C. 1982) (subsequent history omitted) ("'enhanced services' . . . are essentially the equivalent of the 'information services' described in the proposed decree"). Accord Implementation of the Non-Accounting Safeguards of Sections 271 and 272 of the Communications Act of 1934, as amended, CC Docket No. 96-149, FCC 96-489 (rel. Dec. 24, 1996), at ¶ 102 ("all of the services that the Commission has previously considered to be 'enhanced services' are 'information services'"). As noted above, however, the Commission has suggested that the term "information services" is broader than "enhanced services." See note 4, supra.

^{8/} U.S. v. Western Electric Co., Inc., 552 F. Supp. at 179 (emphasis supplied).

storage and retrieval services and electronic mail. These services were considered "information services" because voice or data storage in this context was "a feature of [the] service offering"^{9/} rather than simply an "inherent aspect of the technology used in transmission or switching."^{10/} Likewise, the provision of an information "gateway" was considered to be an information service.^{11/} The fact that these services involved, at some level, the transmission of information of the user's choosing did not render them telecommunications because what was being offered was the "capability for generating, acquiring, storing, . . . [and] retrieving . . . information . . . via telecommunications" -- the hallmark of an information service. Indeed, the MFJ court specifically included voicemail and e-mail within the definition of information services rather than telecommunications services.^{12/} To be sure, providers of these services today use telecommunications to deliver

^{9/} U.S. Department of Justice, Response to Public Comments on Proposed Modification of Final Judgment, 47 Fed. Reg. 23320, 23334 (May 27, 1982).

^{10/} U.S. Department of Justice, Competitive Impact Statement in Connection With Proposed Modification of Final Judgment, 47 Fed. Reg. 7170, 7176 (Feb. 17, 1982). Accord U.S. v. Western Electric Co. Inc., 627 F.Supp. 1090, 1110 (D.D.C. 1986) ("[a]s Ameritech itself has recognized, voice storage and retrieval services fall squarely" within the definition of information services). As the MFJ court subsequently noted, voice storage and electronic mail "are much alike," except in that the former involves the storage of information as a voice message and the latter storage as a printed message. U.S. v. Western Electric Co., Inc., 714 F. Supp. 1, 20 n.82 (D.D.C. 1988).

^{11/} U.S. v. Western Electric Co., Inc., 673 F. Supp. 525, 597 (D.D.C. 1987), (rev'd on other grounds).

^{12/} U.S. v. Western Electric Co., Inc., 714 F. Supp. at 11 ("electronic mail . . . involves the generation or manipulation of content and for that reason should remain prohibited to the Regional Companies under any general restriction on content"); id. at 23 (permitting the BOCs to provide "voice storage and retrieval services, including . . . electronic mail," notwithstanding the inclusion of these services within the definition of information services) (emphasis added).

EX PARTE PRESENTATION OF THE NATIONAL CABLE TELEVISION ASSOCIATION, INC.
CC DOCKET NO. 96-45 (UNIVERSAL SERVICE)

service to end users; as the statutory definition states, an information service provides capability for generating, etc. information via telecommunications. That in and of itself does not transform an information service into a telecommunications service, however.^{13/}

To the extent a person provides enhanced or information services, that person is not a telecommunications carrier.^{14/} Rather, an information services provider uses telecommunications capacity to deliver value-added or content based services. The 1996 Act does not disturb this traditional conduit/content or basic/enhanced distinction. Rather, by borrowing the telecommunications/information services distinction from the MFJ, the 1996 Act codifies that distinction. Thus, providers of information services are not "telecommunications carriers" or "providers of telecommunications services." Such entities are thus not obligated to contribute to the maintenance of universal services; nor are they subject to common carrier regulation applicable to telecommunications carriers.

F1/64309.1

^{13/} Further evidence of the enhanced nature of voicemail and e-mail can be found in the fact that providers of such services routinely add time- and date-stamps to messages, in essence "enhancing" the message itself. Cf. U.S. v. Western Electric Co., Inc., 1988-1 Trade Cases ¶ 67,904, at 57,546 (D.D.C. 1988) (time announcements are information services).

^{14/} See, e.g., Amendment of the Commission's Rules and Regulations (Third Computer Inquiry), Phase II, 2 FCC Rcd 3072, 3080 (1987) ("Computer III Phase II Order").